

Blog Post

# Just in Time for the Holidays, the EEOC Proposes Guidance on Religious Bias

November 23, 2020

It seems that the Equal Employment Opportunity Commission (EEOC) is getting into the holiday spirit and addressing religious bias for the first time in twelve years. Last week, the EEOC proposed updated religious discrimination guidance for public comment. This guidance (clocking in at well over 100 pages) is in line with the agency's goal to revamp its stance on religious discrimination and protections afforded to employers, especially those affiliated with a religious faith. For employers, the recent guidance provides reasons both to celebrate and gear up for a chilly winter.

## "Religious Employers"

As a preliminary matter, the proposed guidance includes a more flexible definition of a "religious" employer. Eliminating the requirement that an employer be a nonprofit in order to qualify as a religious employer, the EEOC now states that is an "open question" as to whether a for-profit organization may be exempted under Title VII and punted the issue to federal district courts. According to the agency, the courts have the discretion to determine whether an entity is religious depending on the facts of each case.

## Two Key Exceptions

Most notably, the proposed guidance broadens the "ministerial exception," which exempts religious

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employers from complying with anti-discrimination laws that normally apply to other private and public employers. Formerly applied by the EEOC to block only the claims of high-level clergy and other religious leaders, the guidance expands the application of the “ministerial exception” to now bar the claims of “lay employees,” even if these employees are not considered religious and do not practice the faith of their employer. The proposed guidance seems to align the EEOC’s viewpoint with that of the U.S. Supreme Court, which recently affirmed the legitimacy of and expanded the “ministerial exception” this summer in *Our Lady of Guadalupe School v. Morrissey-Berru*. However, the EEOC proposed guidance does not go quite as far as the Court did in its recent landmark decision in *Bostock v. Clayton County*. While in that decision the Court held that Title VII’s ban on sex-based discrimination covers sexual orientation and gender identity, the proposed EEOC guidance does not denounce gay and transgender bias as illegal under Title VII.

The proposed guidance also unequivocally supports the “religious organization” exemption under Title VII of the Civil Rights Act, which protects religious employers from the anti-discrimination law’s ban on religious bias and allows them to give job preferences to members of their own religion during the hiring process.

## Religious Accommodation and Harassment Standard

Another noteworthy change involves requests for religious accommodations. According to the EEOC, there are no “magic words” necessary to assert a valid request for an accommodation. If the employee doesn’t provide enough information to properly assess his or her request, the employer is obligated to follow up with this employee and get more details.

The EEOC also heightened the standard for “religious harassment,” stating that actions must be

“extremely severe” and go beyond isolated and insensitive behaviors to be considered harassment under the interpretation of the agency.

## Holiday Festivities and Employee Attire

Further, the proposed guidance says that “secular” decorations in the workplace, including wreaths and trees, can be displayed even if not everyone in the office celebrates the associate holiday. Employers also do not have to decorate for every holiday celebrated by their employees with different faiths; they can decorate for only one holiday if they so choose without being accused of bias. However, the agency stated that an employer may have an obligation to accommodate employees whose beliefs differ from the message of their employer. For example, according to the EEOC, an employer may be prohibited from requiring employees to wear pins supportive of the LGBTQ community if the employee does not feel comfortable donning the pin due to their individual beliefs.

## What to Expect

The hypotheticals included in the EEOC’s guidance also hint at the possibility that we should expect more cases involving the intersection of anti-discrimination laws and religious protections on the horizon.

The proposed guidance is available for public comment until December 17, 2020, during which the public can submit their thoughts on the proposed guidance. While the guidance, even when final, does not have the force of law, it “is intended to provide clarity to the public on existing requirements under the law and how the Commission will analyze these matters in performing its duties.” At this early stage, all public and private sector employees should review their policies, especially those involving requests for religious accommodation and workplace attire, to ensure compliance with the proposed changes from the EEOC in time for the holidays festivities. For any employment concerns

as this unconventional holiday time draws closer, contact your Akerman attorney for further information and guidance.

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